

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of the
Owners of the Barque "Amelia" v. the
Owners of the Brig "Susan Bayley" (the
"Amelia," the "Susan Bayley"), from the
High Court of Admiralty of England;
delivered July 24th, 1873.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

This is a case of collision between two sailing vessels, one being the British brig named the "Susan Bayley," the other an American barque named the "Amelia." The "Susan Bayley" was on a voyage from London to Lagos and Cape Coast Castle on the coast of Africa. The "Amelia" was on her voyage from Havre to New York. The two vessels met in the English Channel between half-past eight and nine o'clock in the evening of the 7th of November, 1872, and from 25 to 30 miles either south-east or east-south-east of the Lizard. The wind was blowing moderately from the south-west. Both vessels were close hauled; the "Amelia" on the starboard tack, the "Susan Bayley" on the port tack. The course of the "Susan Bayley" was west-north-west, and that of the "Amelia" south-south-east. According to the preliminary Act, the vessels sighted each other at a distance of about a mile, the "Susan Bayley," as those on board her say, seeing the red light of the "Amelia" about two and a half points on her starboard bow, and those on board the "Amelia" saying that they saw the green

light of the "Susan Bayley" about half a point on her port bow. In these admitted circumstances it was the duty of the "Susan Bayley," under the 12th of the sailing rules, to keep out of the way of the "Amelia," and it was the duty of the "Amelia," under the 18th of the same rules, to keep her course. So far the parties are agreed, and the only issue between them is as to the manœuvres of the two vessels after they sighted each other.

Now the petition of the "Susan Bayley" states, "The course of the 'Susan Bayley' was altered to pass to leeward of the 'Amelia,' and the red light of the 'Amelia' was brought on to the port bow of the 'Susan Bayley,' but the 'Amelia' improperly altered her course and exhibited her green light to those on board the 'Susan Bayley,' and caused danger of collision with her; and although the helm of the 'Susan Bayley' was put hard aport, the 'Amelia' ran into and with her stem struck the 'Susan Bayley' upon her port side, abaft the main rigging, and did her very considerable damage." It is followed by a statement that the "Amelia" improperly neglected to keep her course, and the statement taken altogether necessarily implies that the "Amelia" must have starboarded her helm.

The answer of the "Amelia" states, "In the circumstances above-mentioned, those on board the 'Amelia' saw a green light about a mile off, and about half a point on the port bow. The 'Amelia' kept her course by the wind. Those on board watched the said green light (which was that of the 'Susan Bayley'), and observed it cross their bows and get a little on their starboard bow. Immediately after this the green light was shut in from them, and the red light of the 'Susan Bayley' opened. The helm of the 'Amelia' was at once put hard

“ a port, and her jib sheets were let go ; but before
“ there was time to make any substantial change
“ in her course, the ‘ Susan Bayley ’ ran into her,
“ striking her stem with the port side just abaft
“ the main rigging, and carrying away her jib-
“ boom and bowsprit and part of her cutwater,
“ and causing to her considerable other damage
“ and loss,” and they conclude therefore that the
fault was that of the “ Susan Bayley.”

The case, as made by the evidence on each side, is rather more fully stated by the learned judge in his judgment. He says, “ The ‘ Susan Bayley ’
“ says that she was proceeding under all plain
“ sale, close hauled on the port tack, and making
“ five knots an hour, and heading W.N.W., and
“ carrying her proper lights, and I may observe
“ in passing, that there is no dispute that both
“ vessels carried their proper lights. She saw at
“ about the distance of a mile, two points and a
“ half on her starboard bow, a red light, which
“ was the red light of the ‘ Amelia,’ and the
“ captain says his watch was at eight o’clock,
“ and he was on the poop at the time, and the
“ boatswain was there. The captain says he
“ looked through his glasses before the red light
“ was reported to him, and saw the red light
“ two points on the starboard bow, and about a
“ mile off ; that he deliberated for a minute and
“ a-half, or about that time, as to whether he
“ should keep out of the way, as he knew it was
“ the duty of the port tack vessel to do, by
“ passing to leeward, that is to port or to wind-
“ ward, that is to starboard of the vessel whose
“ red light he had seen ; and at the end of that
“ short deliberation he determined to pass the
“ vessel to leeward, and in order to effect that
“ purpose, gave the order ‘ hard-up.’ Shortly
“ afterwards he gave the order to steady, and he
“ says at the time he so ordered the helm to be
“ steadied he was in a condition to pass clear
“ without difficulty under the stern of the ap-

“proaching vessel; that directly after the helm
“was steadied and he saw the green light, and
“ordered the helm hard-up, and his vessel went
“off three points, and her head pointed to about
“N. at the time of collision. He also says that
“the ‘Amelia’ ran into him and struck him on
“the port side, abaft the main rigging of the
“vessel. I think the evidence was about 16
“or 18 feet from the stern on the port side of
“the vessel.” Then the learned judge adds,
“Now, this story was told very credibly in the
“opinion of the Court, not only by the witness
“whose evidence I have cursorily adverted to,
“the captain, but by other witnesses, the look
“out and the man at the helm.” He then goes
on as to the “Amelia,” and says, “The story told
“on the other side is this:—The barque says
“that she saw a green light about a mile off,
“and about half a point on her port bow; that
“she kept close by the wind and watched the
“green light, and observed it to get a little on
“her starboard bow. The evidence is unanimous
“almost, as far as her witnesses are concerned,
“upon this point, that the brig had gone
“clear of them on their weather bow. I take
“the evidence of the last witness examined,
“the look-out on board the ‘Amelia,’ and he says,
“upon cross-examination, that the brig had gone
“clear of us on our weather bow three lengths
“of our ship. It was a long ship; if she had
“gone on, the collision would not have happened;
“or, if she had stopped where she was, the
“collision would not have happened; and he said
“it was not merely the light which had passed,
“but the ship. The master made a statement of
“the way in which he thought the collision
“happened, agreeing in substance with this last
“witness as to the brig having gone clear of them
“on the weather bow, but the statement was so
“extravagant that, according to his account, the
“collision seemed to the court to be impossible.

“ It comes, therefore, to the question as to credi-
 “ bility of evidence. It has not been disputed that
 “ the brig did rightly in attempting to obey the
 “ law, and keep away from the barque by passing
 “ to leeward, that is, passing on the port side ; and
 “ the question is, whether that resolution was
 “ taken after undue delay, or at an improper time ;
 “ and, after much consideration, I am unable to
 “ arrive at any other conclusion than this, that the
 “ deliberation was not improperly delayed ; that
 “ the measure, at the time at which it was taken,
 “ was right, and that, unless there had been some
 “ action on the part of the barque which interfered,
 “ the brig would have passed safely on the leeward
 “ side of the barque, and there would have been
 “ no collision. Having arrived at that conclusion,
 “ it follows, I must find the bark alone to blame ;
 “ and I do so after a careful consideration of all
 “ the circumstances of the case, and, I repeat, it is
 “ a case which I think must depend upon the
 “ credibility of the evidence on the one side or the
 “ other, and that being so, I think I must prefer
 “ the evidence given by the witnesses produced on
 “ behalf of the brig to those produced on behalf of
 “ the barque.”

It was admitted fairly at the bar, that if the
 story told on behalf of the “ Susan Bayley ” were
 one which, if true, would leave no room for
 imputing blame to that vessel, but accounted
 for the collision by the improper manœuvre of
 the other vessel, whilst, on the other hand, the
 “ Amelia ” set up an entirely inconsistent story
 which threw the whole blame on the “ Susan
 Bayley ” ; and if in that state of things the learned
 judge, who tried the cause and saw the witnesses,
 had said, “ I believe the witnesses for the ‘ Susan
 “ Bayley,’ and I do not believe those for the
 “ ‘ Amelia,’ ” it would have been impossible for
 their Lordships, consistently with the rules or the
 practice of this committee, to say that the judge

ought to have disbelieved the witnesses whom he pronounced to be credible, and ought to have believed those whom he discredited; or to overrule a decision turning entirely on the credibility of conflicting witnesses. To take such a course would be to run counter to many decided cases, and in particular to that of "the Princess Alice," in which the rule which their Lordships observe was laid down in the strongest possible language by Lord Hatherley, sitting here as Lord Justice.

The case, however, that has been presented to their Lordships at the bar, is not exactly such as has been just supposed. The learned counsel for the Appellant contended, as they had a right to do, that it lay upon the "Susan Bayley" to keep out of the way of the "Amelia," and that she was responsible for any failure to do so, unless she could show that that failure was due to some false manœuvre on the part of the "Amelia"; they relied upon the great *prima facie* improbability that the "Amelia," which under the rules had nothing to do but keep her course, should wantonly have starboarded her helm; and they insisted that it was still open to them to show that the fault was that of the "Susan Bayley," although the story actually told by their own witnesses, the captain and crew of the American ship, was not altogether credible. To support their theory they fastened upon the admission made by the captain in his evidence in the Admiralty Court, and more strongly before the Receiver of Wrecks, to the effect that before taking the course of porting his helm in order to pass to the leeward of the "Amelia," he had deliberated, as he swore in the court below, from a minute and a half to two minutes, and as he stated before the Receiver of Wrecks, from two to three minutes, during which time he thought it possible and intended to weather the crossing vessel instead of passing her to leeward; and

they contended, that although the "Susan Bayley" might not have gone so far on her original course as the American witnesses had represented, she had nevertheless held on too long, intending to pass to windward, and so had got upon the course of the "Amelia" when the captain gave the order to port the helm; that he must be taken by his indecision to have caused a collision, which could be thus accounted for without assuming the other vessel to have failed to keep her course without starboarding.

This question, though it does not arise upon the evidence given on behalf of the "Amelia" which set up a case of a somewhat different kind, seems to have occurred to the mind of the learned judge of the Court of Admiralty, and was considered by him, and to be that to which he refers when he says, "the question is whether that resolution was taken after undue delay, or at an improper time." After considering that question, he came to the conclusion that the deliberation was not improperly delayed, but that the measure at the time at which it was taken was right, and that unless there had been some action on the part of the barque which interfered, the brig would have passed safely on the leeward side of the barque, and there would have been no collision.

Their Lordships conceive that the learned judge of the Admiralty Court was amply justified in discrediting the case made by the witnesses from the American barque. It was argued that the captain might have committed himself inadvertently to an exaggerated and too strong a statement, and that then, instead of retiring from that statement, he attempted to confirm it by the answers which he gave to the questions addressed to him in his examination-in-chief and afterwards by the court, and by the learned counsel who cross-examined him. But their

Lordships, looking at the case made upon the pleadings, looking to the fact that the extravagant case, which the court below has rejected, was not merely made by the captain, but was supported or attempted to be supported by the other witnesses called from the barque, cannot adopt that solution. They must assume that the case really intended to be made, and made on the part of the "Amelia," was that the brig had got clear of her, that she was a point or half a point on her starboard bow, that if she had pursued her course, there would have been no chance of a collision at all, that there was every reason why she should have pursued her course, and that there is no reason whatever why she should have performed that extraordinary manœuvre, which they swear she did perform, of turning herself round and throwing herself across the course of the "Amelia." And their Lordships think that the general discredit which results from having set up that false case must fall upon the witnesses by whom it was supported.

The question remains, whether, assuming that the judge was right in holding that the witnesses for the "Susan Bayley" were, without reference to the untrustworthiness of the witnesses on the other side, entitled to credit, it is possible in that state of things to hold that the fault was, as is now admitted to be made out, the fault of the "Susan Bayley" in deliberating too long, in allowing herself to come upon the course of the "Amelia," and then, for the first time, porting her helm when it was too late to escape the approaching vessel. Allowing for some error; taking the longest time during which the captain has admitted that he was uncertain as to the course he would take, namely, three minutes; assuming that he was mistaken as to the distance of the two vessels, and that they were really nearer to each other than he supposed, their Lordships

believe that it is physically possible that the accident may have come about in the manner suggested at the bar ; but it is obvious that that not being the case originally set up by the other side, is one which comes upon the other side by surprise, and has never been tried upon a fair conflict of evidence. It is hardly the course of courts of justice to admit a *tertium quid* of that kind which is not altogether consistent with the case made by either party, or supported by the evidence given upon either side. Their Lordships however are not driven to decide upon that consideration because they have a clear finding of the learned judge after hearing the witnesses that the resolution was not taken at an improper time or after undue delay, and that but for some manœuvre on the part of the "Amelia" the other vessel would have passed to the leeward of her. That improper manœuvre could only have been that which was sworn to by the witnesses whom the judge of the Admiralty Court has pronounced to be trustworthy, namely, this starboarding of the helm of the "Amelia," which, however strange and however improbable, may nevertheless have happened. The question for their Lordships is, whether they have sufficient grounds, however plausible the case now made may be as a matter of speculation, for overruling the decision of the Court of Admiralty on that point. They have come to the conclusion that the evidence before them, when tested by the clear opinion pronounced by the learned judge on the credibility of the conflicting witnesses, afford no such ground, and they must accordingly humbly advise Her Majesty that the judgment under appeal be affirmed with costs.

It should be mentioned that Mr. Phillimore took a point as to the photographs and the evidence as to the state of the two vessels after the collision. Their Lordships have taken that

into consideration, and after consulting with their nautical assessors, and giving it themselves full consideration, they are of opinion that there is nothing in the appearance of that photograph, or in that evidence which necessarily militates against the theory, that the collision was caused by the starboarding of the "Amelia."